Omondi v Director of Public Prosecution (Criminal Appeal E098 of 2022)
[2024] KEHC 15377 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15377 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E098 OF 2022

S MBUNGI, J

DECEMBER 6, 2024

BETWEEN

JOSEPHAT ODHIAMBO OMONDI ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

(Being an appeal from the conviction and sentence delivered on 13th December 2022 by Honorable J.R Ndururi SPM at Kakamega in Sexual Offence No. E113 of 2021)

JUDGMENT

Introduction

1. The Appellant, Josephat Odhiambo Omondi was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 15th May, 2021 and 4th July,2021 at Kakamega Central sub-county within Kakamega County, being an adult aged 32 years the accused intentionally and unlawfully caused his penis to penetrate the vagina of DV a child aged 15 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the sexual offence act No. 3 of 2006. The particulars of the offence were that on diverse dates between 15th May, 2021 and 4th July,2021 at Kakamega Central sub-county within Kakamega County, the appellant unlawfully and intentionally caused his penis to come into contact with the vagina of DV a child aged 15 years. He pleaded not guilty to both charges.

Facts at Trial.

2. The prosecution set out to prove its case and called four witnesses. PW1 was the complainant DV who gave a sworn statement saying that she was 15 years old and stayed with her mother. She stated that she was born on 28.01.2006 and produced a copy of her birth certificate as evidence. She testified that

she came to know the accused when they met at the home of Richard who is the father to her friend in March 2021. He called her to speak to her privately while she was outside with her friend Mercy. He then invited her to visit his house in Mungulu and they went. In the homestead was the accused's grandmother and his child. They both stayed there for about two hours and she went back home. She recalled that she went to his house again in April 2021 to greet him when schools closed and stayed there for about an hour before leaving for her grandmother's home. She again went to visit the accused person in May 2021 and stayed there for a week and engaged in sex with the accused during the period. She stated that the accused refused to let her go and told her to wait for "sugar" to take home. The next day two police officers came accompanied with her mother and escorted her and the accused to the police station. She was then escorted to Kakamega General Hospital where she was examined and found to be one month pregnant. She further stated that she was at the time of her testimony 9 months pregnant and the accused was the baby's father.

3. On cross examination, she stated that she had indeed told the accused that she left school and had gone to his house on her own volition.

4. PW2 was VK, the mother to PW1. She stated that DV was 15 years old. She recalled that at the time of PW1's disappearance from home in May 2021, she was in class 7 at [Particulars withheld] Primary School. She testified that the accused was well known to her since he was her classmate at [Particulars withheld] Primary School. She stated that she tried to find PW1 to no avail until she was informed by a neighbor that she was at the accused's home. She then reported the matter to the police station at Shitungu AP Camp and police accompanied her to the homestead at 5:00am. They were then escorted to Shitungu AP Camp, where they recorded statements before heading to Kakamega Police Station. An officer then escorted them to the hospital where DV was examined and found to be pregnant.

5. PW3 was a clinical officer from Kakamega General Hospital by the name of Christine Namatsi. She told the court that PW1 reported that she disappeared from home to go and live with her boyfriend who had purported to marry her in May 2021. She examined PW1 and found her to be infected with T. Vaginalis and put on treatment. She was also found to be pregnant, HIV Negative and had a whitish foul discharge in her vulva. The hymen was missing. She was given antibiotics and PW3 filed a P3 form which she produced as exhibits together with the receipts issued at the hospital.

6. PW4 was PC No. 96301 Jemimah Atema attached at Kakamega Police Station. She recalled that on 04.07.2021 she was directed by the OCS to investigate on the case as both the accused and the victim were in custody. The victim was examined and the P3 and PRC form were filled. She stated that she recorded a statement from PW1 who told her that she met the accused on 10.03.2021 when she had gone to visit her grandmother. They fell in love and decided to live together as husband and wife. They stayed as such until 04.07.2021. Her grandmother reported the matter to PW2 who reported to the police. She stated that she was given PW1's birth certificate which showed that she was 15 years old and thus charged the accused with the offence herein.

7. On cross examination by the accused, PW4 stated that the victim had not been forced by the accused but voluntarily agreed to become his wife. She also affirmed that PW1's birth certificate produced as exhibit was genuine and bore the hers and her parent's names.

8. The court considered the evidence adduced in support of the charge and found that a prima facie case had been established and the accused was put on his defence.

Defence Case.

9. The appellant gave unworn evidence and stated that he stayed in Mungulu and does manual work. He stated that he was charged with defiling a school girl. However, no evidence had been brought forth

to prove that he had locked up the girl in his house. He told the court that it was the parents who did not want him to stay with PW1. He stated that he was orphaned and stayed with his grandfather and child. He prayed that the court releases him.

10. In mitigation, the prosecutor submitted that the accused was a first time offender. The accused submitted that he looks after his sickly grandmother and is the sole breadwinner to his 5-year old child.

11. The trial court proceeded to convict and sentenced the accused to an imprisonment term of fifteen (15) years.

The Appeal.

12. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;

    i. That, the trial magistrate erred in both law and facts by convicting him in the wake of doubtful enormous and malicious medical investigation and finding without considering that the case was not proved beyond reasonable doubt.

    ii. That, the trial magistrate erred in law and facts by shifting the burden of proof to the appellant.

    iii. That, the trial court erred in both law and facts by not considering that the case was full of doubts, inconsistencies and contradictions

    iv. That, the trial court erred in law and facts by rejecting the appellant's defence without cogent reasons.

    v. That, the learned trial magistrate erred in both law and facts in convicting the appellant without considering that the P3 had contradictions and did not even spell out the age of injuries.

    vi. That, more grounds to be adduced after receiving the proceedings and other records.

13. The appeal was canvassed by way of written submissions.

Appellant's Case.

14. The appellant lodged three supplementary grounds of appeal in his submissions for consideration by the court as follows:

    i. That, the trial Court erred in law and in fact in not diligently considering the role played by the conduct of the complainant in this offence.

    ii. That, the trial Court erred in law and in fact in not making a finding a mandatory nature of sentence under section 8(4) of the SOA No.3 of 2006 is unconstitutional and not warranted on plea.

    iii. That, the Trial Court erred in law in not making a finding that the appellant's sentence should run from the date of arrest pursuant to paragraph 5.1.21 SPGs Revised, 2023.

15. The appellant lay basis on section 8(5) of the *Sexual Offences Act* and submitted that PW1 behaved like an adult and engaged in sex with him. He further submitted that the relationship went on for quite a long time to the extent that age was a non-issue. He referred the court to the case of Martin Charo vs Republic (2016) eKLR where the Hon. Justice Chitembwe held that the offence of defilement should not be limited to age and penetration, but also the conduct of the complainant.

16. He further submitted that he conceded to the offence right from his cross examination and defence, and ought to have been awarded a one third discount by the court while meting out its sentence as a discount in plea of guilty citing the case of Maingi and 5 others vs DPP & Another (Pet No. 017 of 2021) (2022) KEHC 1318(KLR)

17. Lastly, the appellant submitted that he was arrested on 04.07.2021 and sentenced on 13.12.2022 and the sentence was made to run from the date he was sentenced hence prejudicing his right to absolute law as entitled pursuant to section 25(c) and 50(2)(p) of *the Constitution* of Kenya 2010.

Respondent's Case.

18. On grounds 1, 3 and 5 of the appeal, the prosecution counsel submitted that the main ingredients for defilement were sufficiently proved by the prosecution in the trial court. He submitted that the ingredient of age was proved by the production of a birth certificate by PW4 as exhibit and in support of this PW2, her biological mother, confirmed that she was 15 years at the time of the offence as she was born on 18.01.2006.

19. Secondly, he submitted that the second ingredient of penetration was proven by the victim's testimony in court where she narrated how she met the Appellant and thereafter formed a love affair with him and where after they started engaging in sexual intercourse between the month of April and July 2021. When she suspected that she was pregnant, she went to live with the Appellant as wife and husband.

20. Further, the respondent submitted that in his defence, the appellant admitted that he was living with the victim as his wife and that it is her parents who were against their relationship hence the case facing him. PW1's testimony was collaborated by PW3 who was a clinician by the name Christine Namatsi who testified that on examination it was found that; hymen was broken, PW1 was 1 month pregnant and that she had been infected with T. Vaginalis an infection common to women who are sexually active.

21. On the ingredient of proper identificationof the perpetrator, the respondent submitted that the complainant testified that she met the Appellant when she went to visit her friend Mercy who lived near the Appellant's home and they got into a relationship that spanned for about three (3) months hence the victim knew her defiler very well. The respondent further averred that the Appellant, in his defence, admitted that he was living with the victim as her wife thus proving that he was well known to PW1.

22. The respondents averred that at no time in the matter was the burden of proof shifted to the appellant as the prosecution in its case satisfied the ingredients needed in a case of defilement.

23. It was the respondent's submission that the sentence meted by the trial court was very lenient and not within the provisions of the law. The respondent prayed that the conviction and sentence be affirmed, and further that the sentence be enhanced to 20 years' imprisonment as per section 8(1)(3) of the *Sexual Offences Act* No. 3 OF 2006.

Analysis.

24. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses

testify and make due allowance for the said fact. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the Court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

25. I have looked at the grounds of appeal, the submissions filed by the parties, the lower court proceedings and the trial court's judgment.

26. I find the following issues pertinent for determination:

    i. Whether the offence of defilement was proven to the required standard by the prosecution thereby warranting a conviction.

    ii. Whether new grounds offence can be introduced at the appellate level.

    iii. Whether the sentence imposed was appropriate.

Determination

Issue i: Whether the offence of defilement was proven to the required standard by the prosecution thereby warranting a conviction.

27. The appellant does not deny that he was in a sexual relationship with the complainant DV who was under age (15 years).

28. All the ingredients of defilement were proved.

29. Section 8 of the *Sexual Offences Act* provides as follows:

> Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> (5) It is a defence to a charge under this section if—
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's *Act, 2001 (No. 8 of 2001)*.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity. (emphasis mine)

30. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.

31. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable..."

32. PW4 produced the original birth certificate of PW1 which showed that she was born on 18.01.2006 and was 15 years old at the time of the offence. This was corroborated by PW2 who was the victim's mother who stated that PW1 was 15 years old. I therefore find that the ingredient of age was proved.

33. On the proof of penetration, penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person."

34. PW1 testified that when she went to visit her friend Mercy at their home in March 2021, she met the appellant who was a friend to Mercy's father. The appellant invited her to his house. They went and stayed for a while before she left. She visited the appellant in April 2021 to greet him. She stated that she again went to visit the appellant in May 2021 and stayed at his home for a week. She stated and I quote:

> " ...I stayed with Josephat for one week in May 2021. We started having sex in March 2021. We started having sex on April 2021 on my second visit. We were having sex in his house. We had sex the second time in May 2021 during my third visit. I went back in July 2021. From May to July 2021 I was away from home. I had run away and was staying with grandmother. In July I suspected I was pregnant. Accused came to know I was pregnant. He asked me whether I was pregnant and I told him I was. That was in July. I went to stay in accused's house where I suspected I was pregnant. That's all..."

35. PW3 was a clinical officer who examined PW1. She noted that the hymen was missing. PW1 was also pregnant and infected with T. Vaginalis. She produced the filled PRC and P3 form filled and signed by

her as exhibits in court. This corroborated PW1's evidence that they had sex which was not disputed by the appellant and thus I find that the ingredient of penetration was sufficiently proved.

36. The identity of the Appellant was not in dispute. She was well known to PW1 who stated that they she went to the appellant's home and they lived as husband and wife. Further, PW2 who is the mother to PW1 stated that she knew the appellant since they schooled together in primary school. I therefore find that all the ingredients of defilement were sufficiently proved by the prosecution.

Issue 2: Whether new grounds of defence can be introduced at the appellate level.

37. The appellant relied on section 8(5) of the *Sexual Offences Act* and submitted that PW1 behaved like an adult and engaged in sex with him voluntarily as an adult. He further submitted that the relationship went on for quite a long time to the extent that age was a non-issue.

38. However, Section 8 (6) of the same act states;

> "The belief referred to in sub-section 5(b) is to be determined having regard to all circumstances, including steps the appellant person took to ascertain the age of the complainant."

39. I have perused the trial court proceedings. The appellant did not tell the court any steps he took to find out the age of PW1. In his cross examination of PW1, she states that the appellant asked her where she went to school and she informed him that she had dropped out of school.

40. The appellant referred the court to the case of Martin Chero –Vs- Republic (2016) eKLR where Justice S. J. Chitembwe set free an accused person who was convicted for having sexual relationship with a girl aged 13 years but who behaved like an adult. He observed;

> "It is clear to me that PW1 was behaving like a full grown up woman who was already engaging and enjoying sex with men. She seems not to have been complaining about the incident."

41. The appellant also cited the case of Eliud Waweru Wambui vs Republic (2009) eKLR the SOA No.3 of 2006, section 8(5)(b)(7) where The Court of Appeal observed that;

> "a person more likely to be deceived into believing that the child is over the age of 18 years old if the said child is in the age bracket of 16-18 years the child is, the more likely the deception and the more likely the belief that he or she is over the age of 18 years".

42. The appellant never raised this defence during his trial at the lower court. He gave unsworn testimony and stated:

> "I stay in Mungulu. I do manual work. I was charged with defiling a school girl. No evidence was asked to prove that I had locked up the girl in my house. It is the parents who didn't want me to stay with the girl. My parents are dead. I stay with my grandfather my child. I look at her there. I pray that the court releases me. That is all."

43. I have gone through the proceedings and especially the defence given by the accused before the trial court. He never raised the issue that he believed the complainant was an adult from the way she conducted herself for the trial court's consideration, and even there is no evidence to show that he took

steps to ascertain the age of the complainant such that he can rely on defence afforded by section 8(5)(b) of the Sexual Offence Act which states:

> "(5) It is a defence to a charge under this section if—
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at thetime of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.
>
> (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

44. In the case of PSM *v Republic (Criminal Appeal 203 of 2018)* [2023] KECA 429 (KLR) the Court of Appeal when faced with a similar situation held:

> "The appellant has raised three grounds of appeal being firstly, that he was not accorded an opportunity to cross- examine PW1, secondly, that the language used by the prosecution witnesses was not indicated and therefore his rights as provided under Article 50 (2)(g)–(h) of *the Constitution* were violated and lastly, that he was sentenced to a mandatory minimum sentence of life imprisonment as provided by the statute, which has since been declared unconstitutional by the Supreme Court.
>
> None of these grounds were issues brought to the attention of the trial court, nor were they raised as grounds of appeal before the superior court. The fourth issue that the appellant was not informed that he had a right to legal representation at the State's expense was not a ground of appeal before the superior court neither is it a ground before us. It was mentioned in passing in the submissions. The three grounds have therefore, only sprung up in this second appeal hence, no determination was made on any of them by the courts below.
>
> The practice of springing new grounds on a second appeal is not a novel. This Court has had occasion to pronounce itself on it before. In John Kariuki Gikonyo v Republic [2019] eKLR, the Court stated thus:
>
> > "....We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in *Alfayo Gombe Okello v Republic [2010] eKLR Criminal Appeal No 203 of 2009*; held as follows:
> >
> > > ".... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so,

that it was not raised at the earliest opportunity although it could and should have."

In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal"

On the same issue, this Court in Katana & another v Republic (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR) (21 October 2022) (Judgment) held as follows:

"The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court's decision.""

45. Being guided by the above holdings of the court of Appeal, I decline to entertain the ground of appeal that the trial court erred in law and fact in not diligently considering the role played by the complainant in this defilement.

Issue 3: Whether the sentence imposed was appropriate.

46. The appellant was sentenced to 15 years' imprisonment by the trial magistrate. Section 8(3) of the SOA states:

> "(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

Whereas section 8(4) of the SOA states as follows:

> "(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

47. The charge sheet reads: "Defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offence *Act No. 3 of 2006*"

48. The trial magistrate while sentencing the accused person corrected the error and sentenced the accused under section 8(3) for the complainant was aged 15 years at the time of commission of the offence.

49. To me, the trial magistrate was right to do the correction for the interest of justice and this did not prejudice the appellant in any way or amount to any miscarriage of justice for the appellant knew and understood he was charged with the offence of defiling a girl aged 15 years.

50. Section 8(3) of the *Sexual Offences Act* provides for a minimum sentence of 20 years but not 15 years. So the trial magistrate erred by sentencing the appellant to serve 15 years' imprisonment. He should have sentenced him to serve a minimum of 20 years. I therefore set aside the sentence of 15 years and order that the appellant serve 20 years' imprisonment.

51. The trial magistrate never took into account the provisions of section 333(2) of the CPC when sentencing the appellant. I therefore order that the sentence to start running from the date of arrest and confinement in custody being 04.07.2021.

52. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Accused person – present online

Court Prosecutor – Mbonzo present online

Court Assistant – Rono